

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Estate of
ANTHONY THOMAS.

U.S. BANK, N.A.,

Petitioner and Respondent,

v.

DENISE J. LOVE et al.,

Objectors and Appellants.

D058468

(Super. Ct. No. P192502)

APPEAL from an order of the Superior Court of San Diego County, Gerald C.

Jessop, Judge. Affirmed.

Anthony Thomas (Anthony), who is developmentally disabled, received a medical malpractice settlement based on injuries he sustained at birth. After Anthony became an adult, the court appointed U.S. Bank, N.A. (Bank) as the conservator of his estate. About two years later, the Bank petitioned for an order establishing a special needs trust for Anthony's benefit. After many continuances, the court granted the Bank's petition.

Anthony and his mother, Denise Love (Mother), appeal from the court's order establishing the special needs trust. Appellants contend: (1) the court abused its discretion in approving the trust without first addressing various accounting issues; (2) the court abused its discretion in denying Mother's continuance motion; and (3) the court erred in denying Mother's motion to disqualify the Bank's attorney for a conflict of interest. These contentions are without merit. We affirm the court's order.

FACTUAL AND PROCEDURAL SUMMARY¹

Anthony was born in November 1988. Since his birth, he has been developmentally disabled and cannot provide for his personal needs. Several years after his birth, Anthony received a monetary settlement of a medical malpractice action. The settlement proceeds were initially placed in a guardianship, and were later transferred to a conservatorship. Anthony has lived with Mother all his life, and she has taken care of him.

In 2007, the probate court appointed the Bank as conservator over Anthony's estate. Mother was not appointed because she could not obtain the necessary bond. In February 2008, the Bank purchased a condominium for Anthony to live with Mother. The home was paid in full. Thereafter, Anthony lived in the home with Mother and several other relatives.

¹ As discussed below, each of the parties' briefs contain information that is outside the appellate record. We disregard these portions of the briefs. Our factual statement is based only on information that is part of the appellate record, including the Bank's petition of which we have taken judicial notice.

In July 2009, the Bank petitioned for an order terminating the conservatorship and transferring 20-year-old Anthony's assets (except for the condominium) into a special needs trust for Anthony's benefit. The Bank alleged that Anthony cannot qualify for Medi-Cal or Supplemental Security Income (SSI) benefits because he has more than the maximum allowable cash resources, but he would be entitled to these benefits if these assets were transferred to a special needs trust. The Bank alleged that Anthony would substantially benefit from a special needs trust because he would preserve his own assets and obtain necessary financial and medical assistance from the government.

After the court granted Mother's numerous continuance requests, on August 23, 2010, the court held a hearing on the Bank's motion. At the hearing, Harold Ayer appeared as the Bank's attorney. Scott Cole appeared as the court-appointed attorney for Anthony. Mother appeared on behalf of herself.²

At the outset of the hearing, Mother requested that the court grant her a continuance to "investigate some other things that's going on . . . before they put up my son's money into a special needs trust." She stated that she objected to the special needs trust, and that an attorney, Jan Mason, had agreed to represent her regarding this issue and on issues pertaining to claimed conflicts of interest between herself and the Bank's attorney. In her written application for the continuance, Mother noted there were

² Although Mother was not a named party in the action and there is no indication that she is Anthony's legal guardian or custodian, the record does not show the parties objected to Mother's status as an objector to the Bank's motion.

accounting and trust management issues that needed to be addressed. She requested a continuance of 90 to 180 days to allow time for "investigation, research and discovery."

In response, the Bank's counsel (Ayer) said he spoke with attorney Mason and told him it was essential that Mason appear at the hearing or communicate with the court because the court had granted the prior continuances to allow Mother to retain an attorney to represent her at the hearing. Ayer said Mason responded that "he was too busy to phone the court at that hearing." Ayer also told the court: "This case has already been postponed 13 months and . . . by my calculations, we're losing at least [\$2,500] a month. We probably lost \$30,000 for Anthony in potential benefits by the delay that has already occurred. It [is not] in the best interests of Anthony to keep with more postponements, especially [if the] requested postponement was three to six months."

Ayer also urged the court to reject Mother's claim of a conflict of interest between himself and Mother, stating he had previously represented Mother when she was Anthony's co-conservator about 10 years earlier. Ayer stated there was no conflict, but if the court found a basis for disqualification, it could "move me out of the case, [and the Bank] can hire another attorney and spend some more [of Anthony's] money and go at it again."

Mother responded that the Bank is "trying to take my son's money" and Ayer has been "belittling me, degrading me and everything else about me, [claiming] that I'm incapable of taking care of my son or our home." Mother also asked the court to review a letter written by her niece, who confirmed that Mother is a "wonderful" parent and is

committed to Anthony's well-being, and that the niece would be willing to be Anthony's guardian if anything happened to Mother.

After reviewing the additional papers provided by Mother and considering the parties' arguments, the court denied Mother's continuance request. The court explained:

"You were here on December 4th, 2009, and you requested that I appoint an attorney for your son, Anthony, and I did. I appointed Mr. Cole. You were back here on April 19th, 2010, and at your request I continued the matter. . . . [¶] On June 25, 2010, we scheduled a trial for today, and you advised me that you had secured Mr. Mason from Los Angeles to represent [you] in this proceeding. I set then a dispo conference with specific instructions that Mr. Mason was to appear or advise me of his representation, which he has not. . . . [¶] On July 9th, at the dispo conference, the conference I scheduled specifically so that Mr. Mason could appear or one of his representatives, he didn't appear. Now, the date of the hearing, he didn't appear. . . . [¶] . . . [¶] I'm going to deny the request for the continuance. I've given you four opportunities to have Mr. Mason appear if he was going to represent you. He has not done so. Consequently, we're going to go forward."

Mother thereafter continued to repeatedly request that the court grant her a continuance, asserting that she believed she was being treated unfairly. The court reiterated its denial of the continuance motion, but then took a break to allow Anthony's counsel to speak with Mother outside the courtroom.

When the proceedings resumed, Ayer requested the court to expressly rule on Mother's conflict of interest claim. The court stated it found no basis for a disqualification, concluding that the earlier representation was "attenuated" and did not show any "conflict at this time."

The court then proceeded to hear evidence on the Bank's special needs trust petition. The Bank presented the testimony of two witnesses — Melissa Hall, the Bank's

trust administrator responsible for Anthony's conservatorship account, and Carol Battaglia, an attorney specializing in special needs trusts who prepared the proposed special needs trust for Anthony. By agreement of the parties, Battaglia's testimony was presented through her deposition transcript. However, the deposition transcript is not part of the appellate record.

In Hall's testimony, Hall stated that the approximate market value of the assets in Anthony's conservatorship estate is \$739,670, consisting of the value of the condominium (\$370,000) and cash and investment assets (\$369,670). From the cash assets, the Bank pays for numerous expenses incurred by Anthony, including prescription medication, medical insurance, homeowner fees, accounting and legal fees, vehicles for Mother's use, and a \$1,500 monthly allowance paid to Mother's bank account. Based on the current spending, Hall estimated that Anthony's estate would have assets only for about six and one-half years. Hall stated that at that time, Anthony would have no assets to pay the maintenance, taxes and other costs for the condominium. Hall said the special needs trust would eliminate numerous monthly expenses because those expenses would be paid by the government. Hall opined that a special needs trust is in Anthony's best interests.

Mother testified on her own behalf. She said she is opposed to the special needs trust. When asked to explain her opposition, Mother stated "our life would totally be upset, because they would tell us what to do, tell us how — what we should spend, what he should have. And if that was to happen, S.S.I. would take all of his money at the end of his [life]. [Anthony's] siblings would not receive anything, and we [are] opposed [to] it." However, at several times in her testimony, Mother acknowledged that the

condominium would be placed in a separate trust, and family members would be entitled to inherit that asset and the condominium could not be reached by government creditors.

Mother further testified she is not concerned that Anthony's settlement funds would be exhausted within six or seven years because she believes that she and other family members would be able to fully support Anthony at that time. She explained that she is a licensed certified nursing assistant and believes she can earn a \$30,000 or \$40,000 yearly salary. However, she acknowledged she was on disability leave from her job because of a car accident, and that her disability benefits were exhausted. Mother also said that her niece and her son have agreed to help her and Anthony in the future, but acknowledged that other family members were living in Anthony's home without paying rent and complained that she had no money for Anthony to travel. Mother additionally submitted a copy of Anthony's resume and testified that she believed Anthony is capable of earning money because he has been attending job training classes.

Anthony's attorney did not call any witnesses, but told the court that he spoke with Mother's niece, who confirmed that she would be willing to help support Anthony and Mother to enable them to stay in the condominium if Anthony's money runs out.

In his closing argument, the Bank's attorney urged the court to approve the special needs trust, asserting:

"The purpose in implementing the special needs trust is that it would give Anthony some benefits that are not currently available, that according to the testimony could be [\$]25,000 to [\$]30,000 per year or more. [¶] [Battaglia's] testimony was that [Mother] might even qualify for in-home assistant's salary if it's determined that Anthony needs some care that she is providing.

"I'm concerned about Anthony. That's my only concern. I'm working myself out of a job in this matter, as is the Bank. [¶] Under the [special needs trust], [Anthony] would pick up about \$845 a month in SSI money that doesn't exist right now. He'd pick up Medi-Cal coverage which doesn't exist right now. He'd pick up the medicine coverage which we don't have and perhaps additional salary for [Mother].

"[C]urrently the conservatorship is [spending] \$41,130 per year in direct assistance, plus an unknown amount from year to year for conservator fees and legal fees In addition, we have a free house, a free place to live. . . . So the total benefits at the moment are somewhere around 60,000, but the total cost is around 75- or 80-. The trust simply cannot sustain it. . . .

"There is no harm to [Mother] and Anthony except that their monthly income will be somewhat reduced, because right now they're receiving an allowance of \$1500 per month, and that would probably be changed to [\$]845. . . .

[¶] . . . [¶]

"The goal here, Your Honor, is [to ensure] . . . this money [will] last for Anthony for 20 years or more instead of all running out in six. And, frankly, it could run out faster than six. There's quite a few legal bills coming up here with regard to this proceeding, and the accounting fees for the last two years for the bank haven't been factored in yet. So we had probably 400,000 or more when the petition was filed. That would probably be down to 340- or something like that by the time we get around to actually implementing it, so we believe if we're looking out for Anthony's interest, the only thing to do is to avail ourselves of all the benefits that exist under the law for someone with his level of disability."

In her closing argument, Mother stated that she did not want the trustee proposed by the Bank (Gail Greer) to serve as the trustee because Mother did not know anything about her, stating: "I feel that it's being unjust to me. I feel we should put our own trustee to be under my son's estate." She also complained that no one spoke with her about the special needs trust or the conservatorship, and that she believed the Bank was

seeking the special needs trust because it "wanted [Anthony's] case out of" the Bank. She also stated that it did not matter to her that the money would be "gone" in six years because Anthony will "be taken care of."

In his argument, Anthony's attorney (Cole) told the court that Anthony has told him he does not want the special needs trust, but Cole did not provide any reason for Anthony's opposition. Cole said that Mother is opposed to the trust because she "feels very strongly that she has the ability to work" and that other family members would help, so she is not concerned if Anthony's estate is exhausted in six years.

After considering the testimony and the parties' evidentiary submissions and arguments, the court granted the Bank's motion. The court said the evidence showed Anthony would benefit if his assets (other than his condominium) were placed in a special needs trust because he would be entitled to Medi-Cal and SSI benefits, and that under these programs Mother might be entitled to a salary for serving as Anthony's caregiver. The court noted the undisputed evidence showed that Anthony's assets would be exhausted "in six to six-and-a-half years," and although the court "hope[d]" that Anthony would be self-supporting at that time, the court had no proof that this would occur. Noting the inconsistencies in Mother's testimony, the court declined to credit Mother's claims that she could financially support Anthony and/or that other relatives would have the ability and desire to provide the necessary support. The court also stated that the special needs trust would substantially decrease the amount Anthony would pay for legal and administrative fees, and that the special needs trust would "help eliminate the risk of losing the condominium."

At the conclusion of the hearing, the court granted the Bank's motion, and stated it would provide Mother time to propose a qualified trustee, and if she did not propose a trustee within a specified period, the court intended to appoint Greer, who was experienced and met the requirements of a special needs trustee. Mother did not propose a qualified trustee, and Greer was later appointed as the trustee of the special needs trust.

Mother and Anthony appeal from the order creating a special needs trust for Anthony's benefit.

DISCUSSION

I. *Preliminary Matters*

Well-established appellate rules require that all factual statements in an appellate brief be supported by citations to the record and all factual assertions be confined to matters in the appellate record. (Cal. Rules of Court, rule 8.204(a)(1)(C); see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.) Each of the parties in this matter (appellants and respondent) filed an appellate brief violating these rules.

By order, we notified the parties of these violations and provided the parties with the opportunity to file corrected briefs. Although each party filed a corrected brief, the parties continued to assert facts in their briefs that are unsupported by a record citation and to discuss numerous matters that are outside the appellate record.

Because the issues before us involve a disabled conservatee, we exercise our discretion to consider the appeal despite the substantial rule violations. However, we disregard all factual statements in the briefs that are not part of the appellate record and do not address legal contentions based on matters outside the record. (*Gotschall v. Daley*

(2002) 96 Cal.App.4th 479, 481, fn. 1.) In reviewing the appeal, we are limited to considering the evidence contained in the appellate record and facts that were before the court at the time of the court's challenged ruling. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 334, pp. 385-386.) Because of the lack of clarity in the briefs and appellate record, we have reviewed the superior court file in an effort to determine what facts were before the court at the time it made its challenged ruling, and we specifically take judicial notice of the Bank's amended petition requesting the special needs trust. (Evid. Code, § 452, subd. (d).)

Mother requests that we augment the appellate record with certain submitted documents "because they will support the basis for why this matter should be appealed." We deny this augmentation request. The proffered documents are not properly before us because they are not file-stamped and there is no indication that they were before the court when it made the rulings that are the subject of this appeal.³

On a separate issue, the Bank challenges Mother's standing to appeal in this case. We agree that there does not appear to be an independent basis for Mother to have been a party to the Bank's motion involving her adult son, unless Mother had some guardian status that does not appear in the record before us. However, there is no showing the

³ In so ruling, we note that a letter from Mother's niece and a written continuance motion were provided to the court at the time of the hearing and the court reviewed these submissions. These papers appear to be part of Mother's augmentation request. Assuming these documents are accurate copies of the documents considered by the court, we have reviewed the documents. However, we find there is nothing in these documents showing error in this case.

Bank challenged Mother's right to participate at the hearing. Thus, we assume for purposes of this appeal that Mother has standing to challenge the court's ruling. However, as discussed below, to the extent Mother raises issues that conflict with Anthony's best interests, we find they have no persuasive value. The sole issue before the court was Anthony's best interests and needs.

We now turn to the merits of the parties' appellate contentions.

II. *Special Needs Trust*

Mother and Anthony contend the court erred in granting the Bank's motion to establish a special needs trust and to place Anthony's assets in that trust (with the exception of the condominium).

California law authorizes a court to establish a special needs trust to preserve the availability of public benefits to the conservatee. (See *Conservatorship of Kane* (2006) 137 Cal.App.4th 400, 406; 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 1072, pp. 1197-1198.) The trust allows a beneficiary to receive funds for "special needs," while maintaining eligibility for public assistance to cover basic needs and medical care. (*Shewry v. Arnold* (2004) 125 Cal.App.4th 186, 191; see *Conservatorship of Kane, supra*, 137 Cal.App.4th at p. 406; *Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 888.)

Under the substituted judgment doctrine, a probate court has the authority to establish a special needs trust for a disabled beneficiary. (See *Conservatorship of Kane, supra*, 137 Cal.App.4th at pp. 403-408.) To show the necessity for the trust, a petitioner must establish three factors: "(1) That the minor or person with a disability has a

disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap. [¶] (2) That the minor or person with a disability is likely to have special needs that will not be met without the trust. [¶] (3) That money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or person with a disability." (Prob. Code, § 3604, subd. (b).)

A probate court has broad discretion in determining whether the petitioner has established these factors and whether a special needs trust is appropriate under the factual circumstances of the case. (See *Conservatorship of Kane, supra*, 137 Cal.App.4th at p. 408.) Once created, the special needs trust is subject to the court's continuing jurisdiction and supervision. (Prob. Code, § 3604, subd. (a)(1).)

In this case, Anthony and Mother challenge the court's decision to establish the special needs trust. However, they do not challenge the sufficiency of the evidence to support the court's determination that the conservator satisfied the three statutory factors for creating the trust. Instead, they argue primarily that the court should have *first* reviewed the "finances in this case" and returned funds wrongfully "spirited away" by unspecified individuals. Anthony and Mother claim that Anthony received a medical malpractice settlement of approximately \$1.5 million in 1995 and that the court should have first permitted a complete forensic accounting to determine why this amount had "dwindled down" to \$369,670.

The court did not err in granting the Bank's motion for a special needs trust without first conducting the type of historical accounting analysis discussed by Mother

and Anthony in their briefs. Most of the discussion in appellants' briefs pertains to matters that occurred many years earlier (without citation to the appellate record). On our review of the superior court file, it appears that the court had jurisdiction over Anthony's guardianship and/or conservatorship for at least 11 years, and has approved numerous accountings over this time period. There is nothing in the record showing that Mother or Anthony (who has been represented by his own counsel throughout the proceedings) challenged any of these orders on appeal. To the extent Mother and Anthony sought to raise issues concerning these prior orders at the August 2010 hearing, these challenges are untimely.

Moreover, even assuming a request for a comprehensive accounting was timely, the court was not required to consider these issues *before* approving the special needs trust. The court specifically found Anthony would benefit from the trust, and that further delay was detrimental to Anthony's interests. The court thereafter retains full authority to hold the Bank accountable for improper disbursements and Anthony would have the right to seek a return of such funds (assuming a timely challenge). But the return of these funds to Anthony's estate would not mean that a special needs trust was unwarranted. The court, which has continuing supervision over the special needs trust, would have the authority to determine whether the funds should be placed in the special needs trust and/or whether the circumstances have changed so that the special needs trust should be terminated.

In making these observations, we emphasize there is no evidence before us showing any form of wrongdoing by the Bank or any other fiduciary. We merely note

that if such facts come to light, they would not negate the court's authority to create a special needs trust at this time. Further, to the extent Mother is asking us to make orders regarding future accountings, this is not the role of an appellate court. Our task is to review the order from which the appeal was taken — the order granting the Bank permission to establish a special needs trust. The record establishes the court acted within its authority to order the establishment of this trust for Anthony's best interests.

III. *Continuance*

Anthony and Mother contend the court erred in refusing to grant a continuance for Mother to retain an attorney to represent her.

Anthony's appellate challenge is waived because he never asked for a continuance and he has no standing to assert Mother's claim on appeal. Mother's appellate challenge is without merit because the court did not abuse its discretion in denying the continuance.

A trial court has broad discretion in granting or denying a continuance. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) An abuse of discretion is demonstrated "only where the court's decision ' "exceeds the bounds of reason, all circumstances being considered. [Citation.]" ' [Citation.]" (*People v. Ranger Ins. Co.* (2000) 81 Cal.App.4th 676, 679-680.)

The record shows that Mother requested a continuance of three to six months to "investigate . . . things" and to allow her counsel to properly represent her at the hearing. In response, the Bank's counsel noted the Bank had filed its petition seeking a special needs trust more than one year earlier; the court had granted numerous continuances to Mother; and another continuance would be substantially detrimental to Anthony's best

interests because he is losing at least \$2,500 per month by remaining ineligible for governmental benefits.

In denying the continuance motion, the court agreed with the Bank's arguments. The court further rejected Mother's claim that the denial of a continuance was unfair because she was not represented by counsel. The court explained that Mother had known for at least two months of the special needs trust hearing date, and the court had previously made clear to Mother that her counsel needed to appear at the hearing or at least communicate with the court if he intended to represent her in this matter. The court stated that it had given Mother "four opportunities to have Mr. Mason appear if he was going to represent you" and "[h]e has not done so." Thus, the court found it was appropriate to move forward in the matter.

The court's decision was not an abuse of discretion. The record supports that the continuance was not in Anthony's best interests and the court had a reasonable basis to conclude that it had already provided Mother with sufficient time to obtain counsel and/or to obtain additional facts to present at the hearing. The court's decision was fully justified and did not exceed ""the bounds of reason."" (*People v. Ranger Ins. Co.*, *supra*, 81 Cal.App.4th at pp. 679-680.)

IV. *Conflict of Interest*

Mother and Anthony contend the court erred in refusing to disqualify the Bank's attorney (Ayer) because Ayer had previously represented Mother and the Bank as co-conservators.

The court found no conflict because the earlier representation was "attenuated." Without citing to any legal or factual authority, Mother and Anthony argue that the court erred because "where an Attorney engages in the providing of confidential advice, as Mr. Ayer did for Ms. Love; and, then went to work for U.S. Bank involving the same matter, the provision of negligent confidential advice — presumed from the existing 'Conflict of Interest' resulting in the reliance on that advice i.e. by Ms. Love put the assets of this matter in serious straights."

The argument is without merit. First, there is nothing in the record showing a noticed motion to disqualify Ayer. Second, appellants do not explain how a possible conflict between Ayer and Mother has any effect on Anthony's rights. In addition to his representation by a conservator, Anthony was *also* represented by his own counsel. The counsel did not raise any issue with a conflict, nor is there any basis for finding Anthony would be harmed by such a conflict.

Moreover, the appellate record does not show any basis for a conflict. Although it is not entirely clear, it appears that Mother and the Bank were Anthony's coguardians until Anthony turned 18, when the conservatorship was established. During some or all of that time, Ayer represented Bank and Mother. Mother does not contend this dual representation constituted a conflict, as the interests of Mother and the Bank vis-à-vis Anthony were consistent at that time. Mother contends, however, that the court should have disqualified Ayer at the special needs trust hearing because Mother was attempting to raise issues of the Bank's negligence and malfeasance and Ayer had provided "confidential advice" to Mother in his earlier representation of her. There is nothing in

the factual record supporting the assertion that any prior advice would have created a conflict in the current proceeding. The court did not abuse its discretion in finding there was no basis for disqualifying the Bank's attorney and continuing the hearing to require the Bank to retain a new attorney.

V. Conclusion

Mother, who is not represented by counsel on appeal, raises various challenges to the court's rulings. We conclude these arguments are without merit.

We likewise find that the arguments asserted by Anthony's appellate counsel (Duane Folke) have no merit. Additionally, because Folke devotes the majority of Anthony's appellate brief to reasserting arguments made by Mother in the hearing below, which were not joined by Anthony's independent counsel (Cole), we are concerned that valuable financial resources have been devoted to matters that do not advance Anthony's interests. Accordingly, any requests for fees on appeal should be carefully scrutinized to ensure they were necessary and reasonable to protect Anthony's interests.

DISPOSITION

Order affirmed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.